United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 8, 1998

TO : Paul Eggert, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IBEW Local 125 (Loy Clark Pipeline)
Cases 36-CB-2183-1 and -2,
36-CD-213-1 and -2

542-3333-9200
542-3367-0150
542-6750
542-6770
560-7580-5060

These cases were submitted for advice as to whether the Union violated Sections 8(b)(1)(B) and/or 8(b)(4)(ii)(D) by filing a defamation lawsuit against the Employer and its attorney.[1]

FACTS

Loy Clark Pipeline ("Loy Clark" or "Employer") provides a broad range of support services necessary in utility construction work, such as paving, drilling, saw cutting, concrete work, and equipment rental. During the relevant period, it has been party to collective-bargaining agreements with Respondent IBEW Local 125 ("Local 125") and Operating Engineers Local 701 ("Local 701"), among others.

On at least two occasions in February 1997,[2] Local 125 officials denied Loy Clark's Local 701-represented employees access to a common situs jobsite to perform excavation work for Portland General Electric ("PGE"), a public utility, because they did not possess Local 125

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[1] Insofar as the lawsuit has been withdrawn in its entirety, there is no need to address the Charging Party's Section 10(j) request.

[2] All dates are in 1997 unless specified otherwise.

cards.[3] After one such episode, Local 125 Business Manager Bill Miller told Employer president Ron Clark that Clark had "upset the apple cart" by giving the work to Local 701 and that there were going to be a lot of problems. Miller advised Clark, both orally and in writing, that the Union claimed all such work under the terms of its collective-bargaining agreement with the Employer. Nonetheless, he assured Clark that the problem could be resolved if the employees Loy Clark dispatched also held Local 125 cards. Thus, Miller demanded in writing that "[a]ll Operators performing work on utility property shall become members of IBEW Local 125." In a follow-up letter, Miller requested a list of all employees "currently performing IBEW jurisdiction work" (which included employees represented by Local 701) and specified that "[t]hese employees will become members of IBEW Local 125." He warned Clark that "[c]urrent Loy Clark employees who do not maintain their membership will not be allowed to work on these projects," and he apprised the Employer of the specific amounts of working and non-working dues.

Clark acceded to Miller's demand. Thus, he announced to his employees, including members of Local 701, that the Employer would pay for all new costs associated with joining IBEW Local 125, including dues and fees, but that the employees would have to join the Union.

Upon learning of the new arrangement, Local 701 immediately reasserted its jurisdiction over the work and threatened the Employer with "appropriate economic action" if the work were reassigned to Local 125. Local 701 subsequently filed a charge in Case 36-CD-207 against Local 125.

Acting on its understanding of the agreement, the Employer sent Local 125 a check to cover dues and fees which it had collected from employees' paychecks. However, Miller returned the assertedly "illegal deductions" the next day, insisting that the Union did not have authorization from the employees to accept their dues.

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[3] Some of the facts herein are taken from the Section 10(k) determination involving the instant parties, reported as IBEW Local 125 (Loy Clark Pipeline), 324 NLRB No. 133 (October 22, 1997).

Miller similarly returned a second check from the Employer. He insisted that dues payments are payable by employees only, and only after they have applied for and have been accepted into membership and have authorized checkoff.

Meanwhile, the Region held a 10(k) hearing on June 3 and 4, attended by representatives of the Employer, Local 125 and Local 701. On the second day of the hearing, Local 125 agreed on the record that Loy Clark could assign the disputed work to Local 701.

According to the Employer, after the hearing closed Miller made a series of "questionable" statements about the case which caused some unrest among the employees. Thus, in order to set the record straight, Loy Clark's attorney, Les Smith, drafted a short description of the outcome of the hearing. Smith gave a copy of the as-yet uncirculated draft to Local 701 to distribute to its members.

On or around July 8, Local 701 gave its members a near verbatim copy of Smith's announcement.[4] The notice stated, in part, that:

> The IBEW made clear that it would not require "dual cards" and the payment of union dues and fees to the IBEW by those who are members of the Operating Engineers, the Laborers or the Teamsters. The IBEW has returned monies it has received because the IBEW has recognized it was illegal to accept such money.
>
> The Company will continue to do off-the-dock work for PGE and other related work. Under the law, the Company does not need an IBEW contract to perform this work. If anyone hears that the IBEW is continuing to claim such work; that the Company cannot do such work; or if the IBEW makes any other threats or accusations about off-the-dock work, please let Local 701 or the Company know immediately. [Emphasis supplied.]

[4] Neither Smith nor the Employer circulated their draft to employees.

Local 125 representatives immediately accused Smith and the Employer of defaming the Union by drafting the notice and giving it to Local 701 for distribution. Local 125 contended that the notice maliciously defames the Union by falsely claiming that it: (1) required Loy Clark employees to carry dual IBEW/Operating Engineers cards; (2) accepted Union dues and fees which the Employer unlawfully coerced from its employees; (3) returned the money only after it belatedly recognized that the payments were illegal; and (4) unlawfully threatened the Employer for refusing to assign the disputed work to the Union. Local 125 demanded a full, written retraction and threatened to file suit.

The Board issued its Section 10(k) determination on October 22. It found reasonable cause to believe that both unions violated Section 8(b)(4)(D) and it awarded the disputed work to Local 701, as expected.[5] By letter dated October 30, Local 125 again demanded a retraction from Smith and the Employer and, receiving none, on November 10 it filed a defamation suit in state court against both parties. The defendants therein removed the suit to federal district court. The Region subsequently issued a Complaint and Notice of Hearing against Local 125 in Case 36-CD-207 alleging that the Union failed to comply with the Board's October 10(k) determination; no trial date has been set.

On March 20, the Union withdrew the lawsuit against both defendants without prejudice in accordance with FRCP 41(a), by which a plaintiff may petition the court for dismissal of its suit either by stipulation of all parties or unilaterally at any time prior to the filing of an answer or a motion for summary judgment by the defendant.[6]

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Union violated Section

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[5] IBEW Local 125 (Loy Clark Pipeline), supra.

[6] It is unclear which basis formed the Rule 41 dismissal herein.

8(b)(1)(B) by filing a meritless and retaliatory lawsuit against the Employer and its attorney. However, for the reasons set forth below, the Region should not also plead that by filing the lawsuit the Union further violated Section 8(b)(4)(ii)(D).

1. Section 8(b)(1)(B)

Not all baseless and retaliatory lawsuits constitute violations of the National Labor Relations Act. Rather, for an unfair labor practice to lie, the suit must also constitute unlawful coercion for a purpose proscribed by Section 8(a) or (b).[7] We conclude that by filing the lawsuit against Smith and Loy Clark, the Union attempted to coerce the Employer by interfering with the selection of Smith as its agent in violation of Section 8(b)(1)(B).[8]

It is settled law that coercion of a Section 8(b)(1)(B) agent in the performance of duties covered under that section, including collective bargaining, grievance adjustment[9] and contract interpretation, constitutes indirect interference with the employer's selection of its

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[7] See Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995) (although preempted union lawsuit enjoys no special protection under Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), no Section 8(b)(1)(A) violation in absence of evidence that suit had a reasonable tendency to coerce employees).

[8] In so concluding, we assume that Smith and the Employer are legally responsible for Local 701's distribution of their notice, inasmuch as they provided the union with a copy for that purpose.

[9] The term "grievance adjustment" extends beyond the application of a formal contractual grievance and arbitration clause. See, e.g., IBEW Local 1547 v. NLRB, 971 F.2d 1435, 1436 (9th Cir. 1992) ("Although the statute speaks of 'collective bargaining' and 'adjustment of grievances,' there need not be a Union contract: A supervisor who performs analogous duties for a non-union employer may also be deemed to be a supervisor charged with section 8(b)(1)(B) duties.")

representatives within the meaning of Section 8(b)(1)(B).[10] Unlawful coercion is not limited to fines or threats, but may include a lawsuit instituted for a Section 8(b)(1)(B) purpose.[11] Therefore, a union which files a retaliatory lawsuit against a Section 8(b)(1)(B) agent in order to interfere with that individual's performance of his or her covered duties violates Section 8(b)(1)(B).[12]

Moreover, an agent who handles jurisdictional questions between competing unions on behalf of his or her employer is engaged in Section 8(b)(1)(B) duties. In Sheet Metal Workers Local 68 (DeMoss),[13] the Board held that the union unlawfully fined a group of supervisor/union members who had awarded unit work to a competing union in violation of their union's constitution. In concluding that the supervisors' duties fell within the ambit of Section 8(b)(1)(B), the Board noted that jurisdictional assignments involve the adjustment of a grievance since they are

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[10] See e.g., San Francisco-Oakland Mailers' Local 18 (Northwest Publications), 172 NLRB 2173 (1968); Florida Power & Light v. Electrical Workers Local 641, 417 U.S. 790, 805 (1974) (assuming, but without deciding, that the Board's Oakland Mailers' decision fell within the "outer limits" of Section 8(b)(1)(B)); American Broadcasting Co. v. Writers Guild, 437 U.S. 411, 429-30 (1978) (upholding Oakland Mailers' indirect coercion test).

[11] See Masters, Mates & Pilots (Cove Tankers Corp.), 224 NLRB 1626 (1976), enf'd 575 F.2d 896 (D.C. Cir. 1978). The Supreme Court has recognized that a meritless lawsuit may constitute coercion under other sections of the Act. Bill Johnson's, 461 U.S. at 740 ("[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" in violation of Sections 8(a)(1) and (4).)

[12] An attorney can constitute a Section 8(b)(1)(B) agent while engaged in duties covered by that section. See, e.g., Broadway Hospital, 244 NLRB 341 (1979) (attorney engaged in collective bargaining duties is a Section 8(b)(1)(B) representative).

[13] 298 NLRB 1000 (1990).

"almost invariably raised in the context of jurisdictional provisions of collective-bargaining agreements."[14]

Here, the Employer asked Smith to compose a notice to apprise employees of the status of an ongoing labor dispute and to ask them for assistance in warding off further coercive conduct by Local 125. Thus, Smith's notice served to protect the Employer's interests in an on-going jurisdictional dispute between Loy Clark and two of its labor unions. There is little difference between the services Smith, as an agent of the Employer, rendered his client by drafting the notice and his actual representative role during the Section 10(k) hearing. Both involved attempts to resolve the "grievance" between the parties and to interpret the competing contractual jurisdictional clauses in order to assign the work. Thus, by seeking a retraction of the notice and significant money damages, the Union's lawsuit had the natural effect of coercing Smith and Loy Clark from continuing with their strategy. Accordingly, we conclude that the lawsuit constituted an unlawful attempt to coerce a Section 8(b)(1)(B) representative in the manner in which he engages in grievance handling and contract interpretation duties.

However, it is too speculative to conclude that the lawsuit also constituted an unlawful continuation of the jurisdictional dispute in violation of Section 8(b)(4)(ii)(D). Although the Union filed its lawsuit shortly after the Board issued its October 22 jurisdictional award, we conclude that the timing, along with other evidence (not otherwise relevant to the instant cases) of the Union's failure to abide by the 10(k) determination, is insufficient, standing alone, to establish that by filing suit, the Union continued to claim the disputed work. The Union has not voiced any such threat in the context of the lawsuit and the suit itself sought compensatory damages for the alleged defamation, rather than a monetary, in-lieu-of award for the work

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[14] Id. at 1003. See also IBEW Local 77 (Bruce-Cadet), 289 NLRB 516 (1988), enf'd 895 F.2d 1570 (9th Cir. 1990) (supervisor making work assignments between unions engaged in 8(b)(1)(B)-covered contract interpretation duties).

assignment itself, relief which might otherwise indicate a Section 8(b)(4)(D) object.[15]

2. Bill Johnson's Analysis

In Bill Johnson's, the Supreme Court held that the Board cannot halt the prosecution of a lawsuit alleged to be an unfair labor practice unless two conditions are met: (1) the plaintiff filed the suit with a motive to retaliate against conduct protected by the Act; and (2) the lawsuit lacks a reasonable basis in fact or law.

Retaliatory motive can be proven from evidence that the lawsuit is baseless,[16] that the plaintiff seeks a monetary award in excess of compensatory damages,[17] or from the plaintiff's prior animus towards the defendant's exercise of conduct protected by the Act.[18] The retaliatory motive can also be determined from the face of the suit, if the activity being attacked is on its face protected conduct under the Act.[19] Additionally, as the Supreme Court

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[15] Compare Iron Workers Local 433 (Swinerton Co.), 308 NLRB 756 n.1 (1992) and cases cited therein (union violated 8(b)(4)(D) by maintaining and attempting to enforce time-in-lieu claims subsequent to Board's contrary 10(k) determination).

[16] Bill Johnson's, 461 U.S. at 747; Phoenix Newspapers, 294 NLRB 47, 49 (1989); Diamond Walnut Growers, 312 NLRB 61, 69 (1993), enf'd 53 F.3d 1085 (9th Cir. 1995).

[17] Phoenix Newspapers, 294 NLRB at 49-50; H.W. Barss, 296 NLRB 1286, 1287 (1989); Diamond Walnut Growers, 312 NLRB at 69.

[18] See Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990), enf'd 934 F.2d 1288 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); H.W. Barss, 296 NLRB at 1287.

[19] See Phoenix Newspapers, 294 NLRB at 50; Geske & Sons, 317 NLRB 28, 58 (1995), enf'd 103 F.3d 1366 (7th Cir. 1997), cert. den. 118 S.Ct. 46 (1997); Dahl Fish Co., 279 NLRB 1084, 1110-12 (1986), enf'd mem. 813 F.2d 1254 (D.C. Cir. 1987).

in Bill Johnson's explained in footnote 5, the Board may enjoin suits that have "an objective that is illegal under federal law," or which are preempted by the Board's jurisdiction.[20]

As to the element of baselessness, the Board is not permitted to usurp the traditional fact-finding function of the trial court. Thus, if a lawsuit raises genuine issues of material fact, the General Counsel may not proceed with a charge, but rather must stay the unfair labor practice proceedings until the judicial action has been concluded.[21] The Supreme Court also suggested that in determining whether a suit has a reasonable basis, the Board may draw guidance from the standards used in ruling on motions for summary judgment and directed verdicts.[22] Nonetheless, the burden rests on the court plaintiff "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," and that there is prima facie evidence of each cause of action alleged.[23]

However, where the plaintiff withdraws the lawsuit, the Board makes a rebuttable presumption that the lawsuit lacked merit.[24] The plaintiff-respondent then has "the

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[20] Bill Johnson's, 461 U.S. at 737-38 n.5.

[21] Id. at 745-46.

[22] Id. at 745 n.11. Under such analyses, the court presumes the facts alleged to be true and draws from the allegations every reasonable inference in the plaintiff's favor. See generally, Blum v. Morgan Guar. Trust Co., 709 F.2d 1463, 1466 (11th Cir. 1983); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Halet v. Wend Invest. Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

[23] Bill Johnson's, 461 U.S. at 746 n.12.

[24] Vanguard Tours, 300 NLRB 250, 255 (1990), enf. den. in pert. part 981 F.2d 62, 65-66 (2d Cir. 1992) (rebuttable presumption inappropriate; action may indicate plaintiff's settlement posture rather than an admission of unreasonable basis for lawsuit). See also Guess, Inc., Case 21-CA-32201, Advice Memorandum dated February 17, 1998, at pp. 7-8.

burden of rebutting the inference that the suit lacked merit ...."[25]

a. Reasonable Basis

Applying these principles to the instant case, we conclude that the Union's lawsuit lacked a reasonable basis as it attacked protected labor speech.

First and foremost, under the Board's framework enunciated in Vanguard Tours, the Union's withdrawal of the suit as against Loy Clark and Les Smith raises the rebuttable presumption that the lawsuit lacked merit. The Union has presented no evidence to rebut this presumption at this time.[26]

Even aside from this presumption, we conclude that the lawsuit was not reasonably based ab initio. The defendants' notice is unprotected, and thus subject to federal or state court regulation, only if it constitutes malicious defamation.[27] In determining what constitutes malice, the Supreme Court has recognized that federal labor law tolerates "intemperate, abusive and inaccurate statements ... even though the statements are erroneous and defame one of the parties to the dispute" -- absent a "malevolent desire to injure" or "a deliberate intention to falsify."[28] Thus, a defamation claim involving labor speech must establish that the communications were clearly unprotected under Section 7, i.e., made with knowledge of

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[25] Ibid.

[26] [*FOIA Exemptions* 2 and 5
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[27] Linn v. Plant Guard Workers, 383 U.S. 53, 64-65 (1966).

[28] Id. at 60-61 (citations omitted). See also Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) ("scab" and "traitor" held to be protected labor speech).

their falsity, or with reckless disregard as to whether they were true or false.[29]

Local 125 alleges that the Employer's notice maliciously defamed the Union in four ways.[30] However, as set forth below, we conclude that the Employer's statements are relatively accurate depictions of the circumstances surrounding the jurisdictional dispute. Furthermore, the Union has adduced no evidence that the defendants disseminated the notice with knowledge of the falsity of their allegations against Local 125 or with a reckless disregard for the truth. Absent proof of a "malevolent desire to injure" or "a deliberate intention to falsify" as required by the Court in Linn and Austin,[31] the defendants' mere use of allegedly misleading statements does not remove the notice from the protections of Section 7 of the Act.[32]

First, the Union contends that it never required members of the Operating Engineers to hold "dual cards" with Local 125, as the notice suggests. Yet, the Union clearly required that "[a]ll Operators performing work on utility property shall become members of IBEW Local 125,"

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[29] Linn, 383 U.S. at 61, 65 (adopting malice standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[30] See supra at p. 4.

[31] See n.28, supra.

[32] See Sierra Publishing Co. v. NLRB (Sacramento Union), 889 F.2d 210, 216-19 (9th Cir. 1989), enf'g 291 NLRB 540 (1988); Diamond Walnut Growers, Inc., 316 NLRB 36, 39 and 46-47 (1995), enf. granted in part and denied in part, 113 F.3d 1259 (D.C. Cir. 1997) (en banc). In particular, see Circuit Judge Wald's concurrence in Diamond Walnut Growers, 113 F.3d at 1277-78 ("Specifically, the Board now views protected activity as encompassing criticism that clearly relates to an ongoing labor dispute, is not malicious in tone, and is not deliberately untrue.")(citations omitted). The plurality opinion in Diamond Walnut Growers by Judge Silberman found it unnecessary to pass upon the issue of the protected status of the leaflet. 113 F.3d at 1267.

and specifically included among them the Local 701 members who appeared on a list of employees performing work within the IBEW's jurisdiction.

The Union further alleges that the Employer defamed it by telling employees that it returned their dues deductions which the Employer collected "because the IBEW has recognized it was illegal to accept such money." The Union maintains that this statement conveys the inaccurate, yet inescapable implication that the Union had second thoughts about its purported dual card scheme and returned the monies because it belatedly "recognized" that it would be illegal to accept it after all. The Union, however, acknowledges that the Employer's statement is an accurate depiction of the events; moreover, the Union's interpretation of the notice is not inescapable. The notice suggests only that the IBEW returned dues payments forwarded to it illegally; it does not make the additional (and, according to the Employer, accurate) claim that the Union demanded such monies from unwilling employees in the first place. Nonetheless, even if employees generally understood the notice to imply that the Union demanded that the Employer unlawfully collect and remit Union dues, the Union presented no evidence to suggest that by conveying the Employer's interpretation of the Union's demands, the Employer engaged in a "malevolent" or "deliberate" attempt to defame the Union.

Lastly, the Union maintains that it never unlawfully demanded the work at issue, and thus that the Employer further defamed it by asking employees to notify it if the Union makes "any other threats" to claim the work. However, the Union's assertion that it never made an unlawful threat is belied by the recent 10(k) determination, where the Board concluded that there was reasonable cause to believe that the Union unlawfully coerced the Employer in an effort to claim the work.[33]

Accordingly, for all of the reasons set forth above, we conclude that the lawsuit does not have a reasonable basis in law or fact.

b. Retaliatory Motive

[33] 324 NLRB No. 133, slip op. at 2.

We further conclude that the Union filed the lawsuit for a retaliatory motive. The Union's prior history of animus against the Employer is exemplified by the outstanding Section 8(b)(4)(D) complaint. The baselessness of the suit, as described supra, is an additional element showing retaliatory motive. Furthermore, the Union sought $100,000 from the defendants for compensatory damages, a figure well in excess of likely harm to the Union. Finally, the lawsuit itself revealed its retaliatory motive, as the Union directly attacked the Employer's exercise of protected labor speech.

Accordingly, we conclude that complaint should issue, absent settlement, to allege that the Union violated Section 8(b)(1)(B) by filing a meritless and retaliatory lawsuit against the Employer and its attorney.[34] However, the Region should not further allege that the filing of the lawsuit violates Section 8(b)(4)(ii)(D).

B.J.K.

[34] [*FOIA Exemptions* 2 and 5

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